

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 101 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

MAHESHBHAI JASHBHAI AMIN

Appearance:

MS VALIKARIMWALA ASSTT. GP For Petitioners

MR KG SUKHWANI for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 03/07/98

ORAL JUDGEMENT

The appellants herein were the original defendants and the respondent herein was the original plaintiff in Special Civil Suit No. 168 of 1991 filed in the Court of the learned Civil Judge, (S.D.) at Vadodara for recovery of damages in the sum of Rs. 7,59,720.00 and for permanent injunction restraining the defendants from making further construction and giving fresh

contract to anybody till the final payment of the plaintiff is to be made and also for injunction restraining the defendants from interfering with the plaintiffs in case the plaintiffs would shift the materials on the site. The plaintiff prayed for mandatory injunction directing the defendants to hand over the possession of the weigh batcher machine coupled with injunction restraining the defendants from interfering with the payment of the R.A.Bills of their contracts and from cancelling the name of the plaintiffs registered as "B" Class Contractor. All these reliefs came to be claimed by the plaintiffs on the ground that the contract as per tender dated 12th September, 1988 for the work of constructing a building for the Forest Department was not performed by the defendants who committed breach thereof resulting in damages as staged above to the plaintiff.

2. The defendants were served with summons and they appeared through the learned Government Pleader in the suit before the trial Court. They, however, moved an application under section 34 of the Arbitration Act for stay of the suit. That application was decided against the defendants and the matter was adjourned for filing of the written statement. In spite of granting several adjournments for that purpose, the defendants failed to file the written statement, the matter was, therefore, placed for ex-parte hearing against the defendants. Accordingly, the trial Court framed the issues vide Exh. 19 and recorded the evidence of the plaintiff and passed the judgment and decree dated 19th November, 1992 decreeing the suit of the plaintiff for Rs.7,34,722.20 ps. with running interest thereon at the rate of 6 % p.a. from the date of the suit till realization in full. The defendants were also permanently restrained from interfering with the plaintiffs from taking two trucks sand, two trucks kapachi and 5000 bricks as also centering materials belonging to the plaintiff, if any, found on the site. The defendants were also restrained from cancelling the name of the plaintiffs as "B" Class Contractor and also from interfering with the running account bill of any contract on the basis of this dispute and also directed to hand over the weigh batcher machine immediately to the plaintiff.

3. The defendants moved an application being Civil Miscellaneous Application No.128 of 1993 in the Court of the learned Civil Judge, (S.D.), Vadodara for restoration of the suit to the file of the Court. This application appears to have been moved on 25th June, 1993 and it has been the grievance of Mr. Sukhawani, learned advocate

for the defendants that the defendants even didnot care to move any application for condonation of delay while moving the aforesaid application for restoration of the suit before the trial Court. The learned trial Judge, by impugned order dated 22nd November, 1997, rejected the said application for restoration of the suit on the ground that the defendants have not shown sufficient cause for setting aside the ex-parte decree and also on the ground that the restoration application was barred by the law of limitation in the absence of any application for condonation of delay.

4. THE DEFENDANTS BEING APPELLANTS HEREIN HAVE CHALLENGED THIS LAST MENTIONED ORDER IN THIS APPEAL FROM ORDER WHICH HAS BEEN CONVERTED FROM FIRST APPEAL NO. 3674 OF 1997 AS PER THE ORDER PASSED BY THE DIVISION BENCH OF THIS COURT (CORAM: J.N. BHATT & A.M. KAPADIA, JJ) DATED 23rd FEBRUARY 1998 WHICH READS AS UNDER :

"Learned A.G.P. Mr. Bhatt states that in view of the objections raised by the other side, the present first appeal may be permitted to be converted into an Appeal from Order, against the order of the trial Court, rejecting the application for setting aside the ex-parte decree.

No copy of the order which is now proposed to be impugned is furnished and, therefore, necessary formalities are directed to be carried out with a prayer to convert it into Appeal from Order. Office will thereafter notify the matter. "

5. This appeal from order has been finally heard today. The facts emerging from the following table have not been in dispute :

Name of work Construction of office building
for Gujarat Community Forestry
Project at Vadodara.

Name of contractor Shri Maheshbhai Jashbhai Amin,
Vadodara.

Agreement No B-1/146 of 1988-89

Estimated Cost Rs. 22,08,844.14 ps i.e. 1 %

above.

Date to commence work 28.10.1988

Date to complete work 27.10.1990

Time Limit 24 months.

6. It has been the case of the plaintiff that on account of the default on the part of the defendants, the work could not be completed during the prescribed period. As against this, it has been the case of the defendants that the work was left incomplete by the contractor some time in the month of April, 1990 leaving the work done to the extent of Rs.3,50,257.00. The result was that the defendants were required to hand over the work to M/s. Delta Construction Co. of Vadodara under agreement No. B-1-6- of 1991-92 at the estimated cost of Rs.18,65,162.70 ps. and the tender cost of Rs.29,99,926.67 i.e. 60% above the estimated cost. It has, thus, been the case of the defendants that the defendants sustained loss in the sum of Rs. 13,40,054.00. It has finally been the stand of the defendants that they were required to move appropriate application before the Gujarat Public Works Contracts Disputes Arbitration Tribunal at Ahmedabad for obtaining said amount of compensation from the plaintiff.

7. With regard to the proceedings of the suit, it has been the say of the defendants that there was communication gap between the concerned department and the learned Government Pleader who was in charge of the proceedings of the suit. As against this, it has been submitted by Mr. Sukhawani that after obtaining adjournments from time to time and after the application under section 34 of the Arbitration Act having been rejected, the matter was placed by the trial Court for hearing of interim injunction application Exh. 5. That application came to be decided on 17th February, 1992. Ultimately, by Exh. 15, proposed issues were tendered to the Court on 30th June, 1992. The trial Court had an occasion to frame the issues as per the suggested issues and on 7th October, 1992, the witness of the plaintiff was examined in view of the fact that the defendants remained negligent in tendering their written statement for defending the suit. The plaintiff closed his evidence on 15th October, 1992 and the matter was then placed for defendant's evidence on 16th October, 1992. However, the defendant's evidence was closed on 17th October, 1992. The judgment was pronounced on 19th November, 1992 as stated above. It has thus been the

submission of Mr.Sukhhwani that there was gross negligence on the part of the defendants in not defending the suit and in not moving appropriate application for restoration of suit to file by setting aside the ex parte decree accompanied with an appropriate application for condonation of delay by setting out sufficient cause for that purpose. In support of his submissions, Mr.Sukhwani has relied upon the following decisions

1. Mangaldoi Tea Co.Ltd.v. Md. Abdul Latif Munshi reported in AIR 1977 Gauhati 54.
2. Yelavarti Anasuyamma v. Chenupatt Raghavamma reported in AIR 1978 Andhra Pradesh 406.
3. Hari Shankar vs. Shankar Ltd. reported in AIR 1983 Patna pg. 333.
4. Traders' Bank Ltd. vs. Avtar Singh, reported in AIR 1988 pg. 55.

Mr. Sukhwani has also relied upon the judgment of the Full Bench of this Court reference to which will hereinafter be made.

In reply, Ms. Valikarimwala, learned AGP placed reliance upon the following decisions of the Apex Court:

1. Collector, Land Acquisition v. Mst. Kariji and others reported in AIR 1987 SC 1353.
2. State of Haryana v. Chandra Mani and others, reported in AIR 1996 SC 1623.
3. Special Tehsildar, Land Acquisition vs. K.V.Ayisumma, reported in AIR 1996 SC 2750.

Whereas it cannot be doubted that there was some amount of inadvertence on the part of the concerned Government Department in not keeping proper track of the matter pending before the trial Court and in not having punctual communication with the learned Government Pleader or the learned AGP in charge of the matter before the trial Court, it is clear that the Government had displayed its stand with regard to the proceedings of the contract in question. There were necessary communications between the parties and it is not that the Government was sitting idle with regard to the progress

of the contract. This Court is not to decide who was at fault with regard to the alleged breach of the contract attributed by the rival parties to the other party. Under such circumstances, although there was some amount of inadvertence on the part of the concerned Government Department as aforesaid, the matter would have required consideration after bipartite hearing. In this connection, Mr. Sukhwani had made reference to the Full Bench decision of this Court in the matter of Municipal Corporation of Ahmedabad v. Voltas Ltd. reported in 1994(2) GLR pg. 1325, where the majority of the bench held that the delay should be explained and established and the Government Departments and Statutory Bodies could not claim any condonation of delay on the ground of administrative follow up while observing that the question of delay would be a question of fact in each case and not a pure question of law. The minority view was that the power to condone delay had been conferred in order to enable the Court to do substantial justice to the parties by disposing of the matter on merits. Reliance was placed upon the aforesaid decision in the case of Collector, Land Acquisition (supra). However, the learned Asstt.GP for the State has shown to this Court the following order of the Hon'ble Supreme Court in SLP (Civil) No. 7642-44 and 8356-59 of 1995 arising from the aforesaid Full Bench Matter:

"On the facts and circumstances stated, these are fit cases for condoning the delay. Accordingly, delay is condoned. The matters are remanded and the High Court is requested to dispose of the matters on merits expeditiously. The appeals are allowed. No costs. "

(Rendered on 8th January, 1995 [Coram: K. Ramaswami and G.B.Patanaik,JJ.]).

She, therefore, submitted that the decision of the Full Bench of this Court will not hold good so far as the question of condonation is concerned. She has, therefore, prayed for condonation of delay, if any, in filing the application before the trial court and also for restoring the suit to file by setting aside the ex-parte decree passed by the trial Court.

In my opinion, facts and circumstances of the case would call for accepting the stand of the Government

although by putting the Government to special cost to be made condition precedent. Following order is, therefore, passed :

The impugned order of rejecting application for restoration by setting aside the ex parte judgment and decree dated 19th November, 1992 is hereby quashed and set aside and Special Civil Suit No. 168 of 1991 is hereby restored to the file of the trial Court by setting aside ex-parte judgment and decree dated 11th November, 1992 on condition that the appellants-defendants deposit a sum of Rs. 7,500/- (Rupees seven thousand five hundred only) in this Court for being paid over to the plaintiffs on or before 27th July, 1998. In case the appellants commit default in so depositing the amount, the appeal shall stand dismissed and the judgment and decree which is set aside as aforesaid shall stand restored. After the aforesaid amount has been deposited, the office will issue writ to the trial Court sending back all the papers of the trial Court, if any, immediately for enabling the trial Court to proceed further into the suit.

The defendants shall file their written statement before the trial court within two weeks from the date of receipt of the writ of this court by the trial Court. The trial Court will then fix up a date for framing the issues and proceed with the trial of the suit and decide the suit in accordance with law.

The office will verify the court fees required to be paid by the Government on this appeal from order and the court fees paid in the first appeal proceedings and give refund of court fees in accordance with law to the Government on account of conversion of first appeal into appeal from order. The office will verify the deposit of Rs. 3,67,361/- made by the appellant into the court and to return the amount with accrued interest, if any, in case the amount has been invested, to the appellants by way of account payee cheque after due verification. The trial court shall see to the expeditious disposal of the suit and the parties to the suit will cooperate with the speedy trial and disposal of the suit before the trial Court.

This appeal is accordingly allowed, however, as per the order of cost set out hereinabove.

Vyas